No. 84-1140

FILED
MAY 13 1985
ALEXANDER L. STEVAS,
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1984

NICK MELIA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General

STEPHEN S. TROTT
Assistant Attorney General

LOUIS M. FISCHER
Attorney

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTIONS PRESENTED

1. Whether petitioner waived his venue claim by failing to assert it prior to the close of the government's case-in-chief at his fourth trial on the same charge.

2. Whether the venue provision in the second paragraph of 18 U.S.C. 3237(a) allows prosecution of a defendant for receipt of stolen goods that have travelled in interstate commerce, in violation of 18 U.S.C. 2315, in a district other than the one in which he received the stolen goods.

TABLE OF CONTENTS

Page

Opinions below 1

Jurisdiction 1

Statement 1

Argument 4

Conclusion 12

TABLE OF AUTHORITIES

Cases:

Davis v. *United States,* 411 U.S. 233 8

Dunbar v. *United States,* 156 U.S. 185 5

Jenkins v. *United States,* 392 F.2d 303 ..... 6, 7, 10

Kitchen v. *United States,* 532 F.2d 445 4

United States v. *Black Cloud,* 590 F.2d 270 ..... 6, 10

United States v. *Boney,* 572 F.2d 397 4

United States v. *Bozza,* 365 F.2d 206 10

United States v. *Burkhart,* 501 F.2d 993, cert. denied, 420 U.S. 946 5

United States v. *Bustos-Guzman,* 685 F.2d 1278 4

United States v. *Chilcote,* 724 F.2d 1498, cert. denied, No. 83-6624 (May 29, 1984) 5

United States v. *Chinchic,* 655 F.2d 547 2

United States v. *Conti,* 661 F.2d 927 2

Page

Cases—Continued:

United States v. *DeKunchak*, 467 F.2d 432 8-9

United States v. *Hasting*, 461 U.S. 499 11

United States v. *Hopkins*, 529 F.2d 775, cert. denied, 431 U.S. 965 10

United States v. *John*, 518 F.2d 705 4-5

United States v. *Johnson*, 323 U.S. 273 ..... 4, 10

United States v. *Melia*, 691 F.2d 672 ..... 2, 8, 11

United States v. *Price*, 447 F.2d 23, cert. denied, 404 U.S. 912 5

United States v. *Valenzuela—Bernal*, 458 U.S. 858 11

United States v. *Wolf*, 535 F.2d 476, cert. denied, 429 U.S. 920 10

Wainwright v. *Sykes*, 433 U.S. 72 8

Constitution, statutes and rules:

U.S. Const. Amend. VI 10

National Motor Vehicle Theft (Dyer) Act, ch. 89, 41 Stat. 324 *et seq.* 9

National Stolen Property Act, ch. 333, 48 Stat. 794 *et seq.* 9

18 U.S.C. (1940 ed.) 413-419 9

18 U.S.C. (1940 ed.) 416 ..... 4, 9

18 U.S.C. (1940 ed.) 418 ..... 4, 9

Page

Constitution, statutes and rules—Continued:

18 U.S.C. 2113 10
18 U.S.C. 2315 ..... 2, 8, 9, 10
18 U.S.C. 3237 4
18 U.S.C. 3237(a) 4, 8, 9, 10
Fed. R. Evid. :
Rule 403 11
Rule 404(b) 8, 11

In the Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-1140

NICK MELIA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A3) is reported at 741 F.2d 70. Earlier opinions of the court of appeals in this case are reported at 691 F.2d 672 and 655 F.2d 547.

JURISDICTION

The judgment of the court of appeals was entered on August 15, 1984 (Pet. App. A1). A petition for rehearing was denied on October 5, 1984 (Pet. App. A4-A5). The petition for a writ of certiorari was filed as of December 4, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of North Carolina, petitioner was convicted of knowingly receiving stolen property that had

travelled in interstate commerce, in violation of 18 U.S.C. 2315.[1] The district court sentenced petitioner to six years' imprisonment. The court of appeals affirmed (Pet. App. A1-A3).

1. The evidence adduced at trial, which is not in dispute, showed that in May 1977, in Stamford, Connecticut, petitioner received $600,000 worth of jewelry that had been stolen from a jewelry store in Wilmington, North Carolina, by co-defendants Robert Mercier, Edmund Maras, Leo Fraley, and Alfred Conti.[2] Petitioner then fenced the jewelry; the buyer paid Maras and Fraley $70,000 in cash and was to pay petitioner $5,000 for his services.

On May 15, 1977, Maras, Fraley, Mercier, and Conti burglarized a jewelry store in Wilmington. They took the store's entire inventory, which exceeded $600,000 in value, plus an undetermined amount of merchandise that was in the store for repairs (C.A. App. 48-53, 78-87, 125-129). After completing their haul, the four men drove to Conti's home

---

[1]This was petitioner's fourth trial. He was indicted in March 1980 on one count of a three count indictment; the remaining counts charged several co-defendants with transporting goods stolen in two burglaries (C.A. App. 8-9). Petitioner's first trial ended in a mistrial when the jury was unable to agree on a verdict. Petitioner's second trial resulted in a conviction, but the court of appeals reversed because of improper joinder of offenses. *United States* v. *Chinchic*, 655 F.2d 547 (1981). On retrial, petitioner was again convicted, but his conviction was again reversed, this time because of several evidentiary errors. *United States* v. *Melia*, 691 F.2d 672 (1982).

[2]Maras and Mercier pleaded guilty and testified for the government at trial. Conti was convicted at petitioner's second trial, and his conviction was affirmed on appeal. *United States* v. *Conti*, 661 F.2d 927 (1981) (Table). Fraley has not been apprehended. A fifth co-defendant, Thomas Cocco, was later indicted for receiving the jewelry from petitioner. In July 1982, venue for that case was transferred to Connecticut, but the United States Attorney there declined to prosecute Cocco.

in Youngstown, Ohio, where they counted their loot and determined that its retail value was more than $600,000 (*id.* at 87-89, 129-131).

The next day, Maras and Fraley took the jewelry and drove to petitioner's home in Stamford, Connecticut (C.A. App. 131-133). Once there, they showed the jewelry to petitioner and his wife (*id.* at 133). Petitioner then contacted a prospective buyer, Thomas Cocco, who came to petitioner's house to examine the stolen jewelry (*id.* at 133-136). After completing his examination, Cocco said that much of the jewelry was of inferior quality, and he offered only $30,000 for the lot (*id.* at 136-137). After some negotiation, Maras, Fraley, and Cocco agreed on the price of $70,000 plus $5,000 for petitioner as "middleman" (*id.* at 137-138, 285-286, 288, 291). Cocco paid $30,000 in cash that day. Maras and Fraley in turn let him have the jewelry and agreed to meet with Cocco the next day for the remaining payment (*id.* at 138-139).

On May 17, petitioner accompanied Maras and Fraley to their meeting with Cocco at a hospital in Bridgeport, Connecticut. Cocco produced a bag containing $40,000 in cash, which Maras and Fraley took with them (C.A. App. 139-140). Before they left, Maras and Fraley told Cocco to pay petitioner his $5,000 fee, and Cocco assured them that he would do so (*id.* at 139-141). Maras and Fraley then returned to Youngstown, where the proceeds were divided equally among the four burglars (*id.* at 92, 140-141).

2. At the close of the government's case, petitioner moved for a judgment of acquittal on the ground that the evidence failed to establish venue in the Eastern District of North Carolina (C.A. App. 337; see also *id.* at 10-12). Petitioner relied primarily on the district court's earlier ruling transferring venue over Cocco's indictment to the District of Connecticut (*ibid.*). The district court held that

petitioner had waived his venue claim by failing to raise it at his three previous trials or prior to his fourth one (*id.* at 337). Petitioner presented no evidence in his defense and simply renewed his motion for a judgment of acquittal, which the district court again denied (*id.* at 338-339). Petitioner did not request a jury instruction on the question of venue.

3. On appeal, the court of appeals declined to hold that petitioner had waived his venue claim, on the ground that the defect was not apparent from the face of the indictment (Pet. App. A2). The court concluded, however, that venue was proper in the Eastern District of North Carolina because the offense was begun in that district, and 18 U.S.C. 3237(a) ¶ 2 permits prosecution of an offense involving interstate transportation of stolen goods in any district in or through which the goods were moved (*id.* at A2-A3). The court based its conclusion upon the specific venue provisions contained in the pre-codification statutes dealing with interstate transportation and receipt of stolen property, 18 U.S.C. (1940 ed.) 416, 418. The court of appeals also rejected petitioner's claim that such a reading of Section 3237 rendered it unconstitutional. The court held that allowing a prosecution to be brought in any district involved in a " 'process of wrongdoing' " was sanctioned by this Court's decisions recognizing that Congress has the power to create such venue provisions. Pet. App. A3, quoting *United States* v. *Johnson*, 323 U.S. 273, 276 (1944).

ARGUMENT

1. The courts of appeals have uniformly recognized that a defendant's failure to make a timely assertion of the claim of improper venue may constitute a waiver of that claim. See, *e.g.*, *United States* v. *Bustos-Guzman*, 685 F.2d 1278, 1280 (11th Cir. 1982); *United States* v. *Boney*, 572 F.2d 397, 400 (2d Cir. 1978); *Kitchen* v. *United States*, 532 F.2d 445, 446 (5th Cir. 1976); *United States* v. *John*, 518 F.2d

705, 708-709 (7th Cir. 1975); *United States* v. *Burkhart*, 501 F.2d 993, 996 (6th Cir. 1974), cert. denied, 420 U.S. 946 (1975); *United States* v. *Price*, 447 F.2d 23, 27-28 (2d Cir. 1971), cert. denied, 404 U.S. 912 (1971). Under the circumstances of this case, petitioner waived his venue claim.

Petitioner's theory is that a person may be prosecuted for the receipt of stolen property only in the district in which he received that property, even though the property may still be moving in interstate commerce from the district of its theft at the time. It should have been obvious from the indictment itself that venue would lie only in Connecticut under this theory, especially when Count 2 is read in conjunction with Count 3. Cf. *Dunbar* v. *United States*, 156 U.S. 185, 190 (1895) (counts of an indictment are to be read in their entirety and in a common sense manner); *United States* v. *Chilcote*, 724 F.2d 1498, 1504-1505 (11th Cir. 1984), cert. denied, No. 83-6624 (May 29, 1984) (same). Count 2 charged petitioner's confederates, but not petitioner, with the interstate transportation of stolen property on May 14-15, 1977, from North Carolina via Ohio to Connecticut (C.A. App. 8), while Count 3 charged petitioner with the receipt of stolen property on May 19 that "was moving as, was a part of, and constituted interstate commerce, from the State of North Carolina to the State of Ohio to the State of Connecticut * * *" (C.A. App. 8-9). The plain import of Count 3 therefore is that petitioner received the stolen jewelry in Connecticut. Accordingly, under petitioner's venue theory the indictment itself sufficiently informed him of the facts necessary to assert his venue claim prior to trial, and his failure to do so amounts to a waiver of his claim. See, *e.g.*, *United States* v. *John*, 518 F.2d at 709.

But even if the indictment did not itself enable petitioner to assert his venue claim prior to his *first* trial, the judgment below was entered at petitioner's *fourth* trial on this charge

(see page 2 note 1, *supra*). Petitioner nonetheless raised his venue claim for the first time only at the close of the government's proof in this proceeding. He did not raise that claim at any of his three previous trials or prior to the fourth, despite the fact that, after his first trial, if not beforehand, he was fully aware of the factual basis for that contention. In each of petitioner's first three trials, as in this one, the evidence clearly showed that petitioner received the stolen goods in Connecticut. While there was some evidence in those earlier trials that petitioner had previously fenced stolen goods for some of his co-defendants, the government always contended that petitioner had received the stolen jewelry charged in the indictment in Connecticut and not at any earlier point. And when petitioner finally raised his venue claim in this case, he relied (C.A. App. 10-12) chiefly on the district court's ruling in co-defendant Cocco's case that was entered fully seven months prior to the start of petitioner's fourth trial. See Gov't C.A. Br. App. 4a (district court's order in Cocco's case).

The rationale underlying the rule that, where the indictment properly alleges venue in the district of trial, a defendant may challenge the government's failure to prove that the crime actually occurred in that district once the government has concluded its case-in-chief, rests on the practical conclusion in particular cases that the defendant's venue claim became ripe only at that point. See, *e.g.*, *United States* v. *Black Cloud*, 590 F.2d 270, 272 (8th Cir. 1979).[3] While

---

[3]In *Jenkins* v. *United States*, 392 F.2d 303 (10th Cir. 1968), the court of appeals permitted a defendant to raise the claim of improper venue on retrial after the jury had returned a verdict of acquittal. But that decision did not suggest that a defendant is always entitled to delay raising a venue claim until that point. As the court observed in *Jenkins*, that case involved "very unusual circumstances" (392 F.2d at 306).

The defendant was charged with burglary of a federally-insured bank in Kansas, with larceny of that bank, and with receiving and possessing stolen property. The defendant was acquitted at the retrial of actual

petitioner asserted his venue claim at that point in this trial, the unusual facts of this case render that assertion untimely. Because this was petitioner's fourth trial on this charge, he was not in the same position as a defendant who is charged under an indictment that is valid as to venue on its face and who is not fully aware of the government's proof of venue until the government has rested its case-in-chief. Rather, because petitioner had seen the government's proof on three prior occasions, he was in the same position (if not in a more favorable one) as a defendant who is charged in an indictment that is allegedly defective as to venue on its face.[4]

For that reason, petitioner should have asserted his venue claim prior to the start of his fourth trial, if not earlier, rather than at the close of the government's case-in-chief. In these circumstances, where a defendant is fully aware of the basis for a claim of improper venue, it is neither unfair nor

---

participation in the theft, whereupon he claimed that the venue for the receipt charge in Kansas, was improper, because, once he was found not to have participated in the theft in Kansas, the only proof of the receipt charge showed that he had committed it, if at all, in Oklahoma. 392 F.2d at 304-306. In those unusual circumstances, the court of appeals held that the defendant had not waived his claim because it was only "when the jury acquitted him of the first two charges, [that] the issue of venue clearly arose" (392 F.2d at 306).

By contrast, in this case the government never alleged and never adduced any evidence tending to show that petitioner had done any acts in North Carolina, where the theft took place. Petitioner's venue claim thus was apparent well before he raised it at the close of the government's proof at his fourth trial. Accordingly, *Jenkins* is inapposite to this case.

[4]The court of appeals declined to rule that petitioner had waived his venue claim because, in its opinion, the defect was not obvious from the face of the indictment and petitioner was thus entitled to assert his claim at trial (Pet. App. A2). That ruling fails to take into account the unique circumstances of this case detailed in the text, which establish that there was no need to delay assertion of the venue claim until well into the fourth trial.

oppressive to require him to assert that claim at a point before trial has commenced so that, if his contention is upheld, the case may be brought in a proper venue without the needless waste, inefficiency, and uncertainty attendant upon a midtrial or postverdict dismissal on venue grounds. The contrary rule would also plainly encourage defendants to engage in precisely the type of "sandbagging" that this Court has often criticized. See, *e.g.*, *Wainwright* v. *Sykes*, 433 U.S. 72, 88-90 (1977); *Davis* v. *United States*, 411 U.S. 233, 241 (1973).[5]

2. The issue of the application of the venue provisions of the second paragraph of 18 U.S.C. 3237(a) to prosecutions under 18 U.S.C. 2315 for receipt of stolen property is one that has rarely arisen and on which there is no conflict among the circuits. In the only other case to consider the question, the Second Circuit, after canvassing the statutory history that the court of appeals relied upon in this case (Pet. App. A3), reached the same conclusion in a prosecution for the sale or disposition of stolen property under Section 2315. *United States* v. *DeKunchak*, 467 F.2d 432,

---

[5]Petitioner offered no reason at trial why he delayed until the government had concluded its case-in-chief before raising this claim (see C.A. App. 10-12, 337-338). In the court of appeals, petitioner sought to excuse his delay by claiming that he could not know prior to the conclusion of the government's case-in-chief whether the government would be able to offer evidence, as it had during his first three trials, that he had an ongoing relationship with his confederates in which he had fenced stolen goods of theirs (Petitioner's C.A. Br. 34-35). But, rather than excuse his delay, petitioner's argument demonstrates that he elected to withhold his claim for tactical reasons. On appeal from the judgment of conviction entered at petitioner's third trial, the court of appeals held this evidence inadmissible under Fed. R. Evid. 404(b). *United States* v. *Melia*, 691 F.2d at 675. Petitioner was thus fully aware before his fourth trial began that there would be no evidence linking him more directly with the theft itself. Accordingly, petitioner cannot now avert the consequences of his delay in challenging venue.

437-438 (1972).[6] Because there is no difference between the sale or disposition and the receipt of stolen property for purposes of Sections 2315 and 3237(a) ¶ 2, the court of appeals' ruling in this case is fully consistent with the only other court of appeals' decision on point.

Petitioner incorrectly asserts (Pet. 8-9, 15-16) that the decision below conflicts with decisions from other circuits that venue for the crime of receiving stolen property lies only in the district of receipt. In fact, only *DeKunchak* considered the application of the second paragraph of 18 U.S.C. 3237(a) to a Section 2315 offense; as noted above, it upheld venue in a district other than the one in which the gravamen of the offense took place. 467 F.2d at 437-439. Moreover, unlike this case and *DeKunchak*, the crimes at issue in the cases petitioner cites, such as the receipt of a firearm by a convicted felon, did not involve the misuse of

---

[6]As the Second Circuit explained in *DeKunchak* (467 F.2d at 437-438), 18 U.S.C. 2315 had its genesis in the National Motor Vehicle Theft (Dyer) Act, ch. 89, 41 Stat. 324 *et seq.*, and was extended to other stolen property in the National Stolen Property Act, ch. 333, 48 Stat. 794 *et seq.* That Act was codified as 18 U.S.C. (1940 ed.) 413-419. Congress also adopted a special venue provision for that offense, which permitted the government to prosecute anyone violating Section 416 "in any district from, into, or through which such [stolen] goods * * * have been transported or removed." 18 U.S.C. (1940 ed.) 418. In the 1948 recodification of the federal criminal code, Congress transferred the former 18 U.S.C. (1940 ed.) 416 to the present 18 U.S.C. 2315. While Congress eliminated the special venue provision from that portion of the criminal code, the same venue provisions, with more general application, became the second paragraph of 18 U.S.C. 3237(a). The Reviser's Notes make clear that the special venue provisions of the former Section 418 were omitted because they were " 'completely covered' " by the current Section 3237. See *DeKunchak*, 467 F.2d at 438 (citation omitted). Accordingly, the court below correctly held that 18 U.S.C. 3237(a) ¶ 2 must be read in light of the relevant history of venue provisions for the particular offense now embodied in Section 2315.

the facilities of interstate commerce to carry out the crime.[7] Accordingly, because those crimes do not implicate Congress's concern, manifested by Sections 2315 and 3237(a) ¶ 2, with preventing the use of interstate commerce in the actual commission of a crime, the definition of "receipt" used in those cases is not determinative of the question of venue for a Section 2315 prosecution.

Nor does petitioner's Sixth Amendment claim merit further review. In holding that venue was proper in the district where petitioner's trial took place, the court of appeals simply relied (Pet. App. A3) upon this Court's statement in *United States* v. *Johnson* (323 U.S. at 276) that Congress is empowered to provide for trial "in any criminal court of the United States through which a process of wrongdoing moves." Petitioner has not identified any conflict with any other court of appeals' decision on this point (see Pet. 9, 14); rather, his complaint is that the court of appeals' improperly relied upon 18 U.S.C. 3237(a) ¶ 2 in

---

[7]Most of the cases on which petitioner relies involved prosecutions for offenses different from that involved here. See *United States* v. *Black Cloud*, 590 F.2d 270 (8th Cir. 1979) (receipt of firearm by convicted felon, in violation of 18 U.S.C. 922(h)(1)); *United States* v. *Wolf*, 535 F.2d 476 (8th Cir.), cert. denied, 429 U.S. 920 (1976) (same, except in violation of 18 U.S.C. App. 1202(a)); *United States* v. *Hopkins*, 529 F.2d 775 (8th Cir. 1976), cert. denied, 431 U.S. 965 (1977) (same). Only *Jenkins* and *United States* v. *Bozza*, 365 F.2d 206 (2d Cir. 1966), even mentioned the continuing offense statute. *Jenkins* merely noted it in passing (392 F.2d at 306), did not specifically refer to the second paragraph of 18 U.S.C. 3237(a), and merely said that the record did not support its application in that case — presumably because bank robbery and the related offenses in 18 U.S.C. 2113 do not have interstate transportation as an element of the offense. *Bozza* considered only the first paragraph of Section 3237(a) and made no mention of the second paragraph, on which the court below relied. 365 F.2d at 220-222. Indeed, because there was no evidence in *Bozza* that the stolen property had ever been in or moved through the district of trial, there was no occasion whatever for *Bozza* to consider the second paragraph of Section 3237(a).

his case. That factbound contention does not merit further review.[8] Petitioner has also failed to show that this issue is likely to recur with the degree of regularity necessary to warrant review by this Court. Finally, any error was harmless. See generally *United States* v. *Hasting*, 461 U.S. 499 (1983). Petitioner has never claimed that his defense was in any way impaired (for instance, by the inability to present witnesses in his defense) or that he suffered any unique personal hardship because he was tried in North Carolina, rather than in Connecticut. Reversal would thus be unwarranted even if any error occurred. Cf. *United States* v. *Valenzuela-Bernal*, 458 U.S. 858, 872 (1982) (government's deportation of defense witnesses does not deprive a defendant of a fair trial "unless there is some explanation of how their testimony would have been favorable and material"). Indeed, petitioner's failure to assert his venue claim prior to the close of the government's case-in-chief at his fourth trial clearly demonstrates that he did not believe that being tried in North Carolina by itself impaired his defense or caused him to suffer any undue hardship.

---

[8] At petitioner's first three trials, the government introduced evidence that he had a continuing relationship as a "fence" for the burglars who stole the jewelry here and that he helped plan other burglaries. See *United States* v. *Melia*, 691 F.2d at 676-677 (evidence of petitioner's prior acts inadmissible under Rules 403 and 404(b)). Evidence of such a relationship would show that petitioner "caused" the interstate transportation involved here. Even at this trial, one of petitioner's cohorts testified outside the jury's presence that he and one of his colleagues had previously fenced stolen jewelry through petitioner and that petitioner's confederates had agreed amongst themselves to give petitioner the first opportunity to buy their future burglary proceeds (C.A. App. 101-115). The district court could have sustained venue in the district of trial on the basis of petitioner's activities as a "fence" for his confederates' stolen goods, even if this evidence was too prejudicial to allow before the jury in its consideration of petitioner's guilt. Because that evidence undercuts the premise for petitioner's constitutional argument, his argument necessarily fails.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
Solicitor General

STEPHEN S. TROTT
Assistant Attorney General

LOUIS M. FISCHER
Attorney

MAY 1985

DOJ-1985-05